

In the Court of Appeals of the State of Alaska

Anthony Michael Pisano,

Appellant,

v.

State of Alaska,

Appellee.

Court of Appeals No. **A-13453**

Order

Date of Order: **9/23/19**

Trial Court Case No. **3AN-17-07343CR**

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges.

This case is before us for a third bail appeal. The defendant, Anthony Pisano, is charged, *inter alia*, with three counts of first-degree murder and one count of third-degree assault. We have twice previously remanded Pisano's case to the trial court to reconsider the monetary component of Pisano's bail.

For the reasons explained in this order, we again remand Pisano's case to the trial court with the directions described herein.

Procedural background

Pisano was charged in September 2017 with shooting and killing three men at The Bullion Brothers gold and silver shop in Spenard — Steven Cook, an owner of the shop, and Daniel McCreddie and Kenneth Hartman, tenants who lived in separate apartments in the same building. The State alleges that Pisano shot all three men and recklessly placed a fourth man, Michael Dupree (the co-owner of the shop), in fear of

imminent serious physical injury. Pisano contends that Dupree shot Cook during a dispute, and that he (Pisano) shot McCreadie and Hartman in self-defense. Pisano's case is awaiting trial.

Pisano has agreed to (and the trial court has ordered) several conditions of bail release: 24-hour supervision by a third-party custodian (Pisano's mother as the primary custodian, and a family friend as a substitute, when needed); 24-hour electronic monitoring through Alaska Pretrial Services; and house arrest with passes only for verified court, medical, and attorney appointments. Pisano has turned his passport over to Alaska Pretrial Services and will be required to sign a waiver of extradition as part of his agreement with the electronic monitoring company. Pisano has also agreed not to possess any weapons, and a representative from Alaska Pretrial Services has searched the home in which Pisano will stay and removed all weapons. Pisano is precluded from having contact with the families of the victims, and he is precluded from leaving the State without the court's permission.

Pisano has twice previously appealed the trial court's bail order to this Court. The only contested issue in both bail appeals has been the amount of monetary bail.

Pisano originally requested that monetary bail be set at a \$50,000 cash performance bond plus a \$25,000 cash or corporate appearance bond. The prosecutor argued instead that the court should set monetary bail at \$1,000,000 — comprised of a \$500,000 cash performance bond plus a \$500,000 cash appearance bond.

After a series of hearings, the court imposed monetary bail greater than the prosecutor's recommendations. The court set a total monetary bail of \$1,300,000 cash

— comprised of a \$900,000 cash performance bond and a \$400,000 cash appearance bond.

In Pisano’s first bail appeal, we remanded Pisano’s case to the trial court to reconsider the monetary component of Pisano’s bail.¹ Based on the record that was then before us, we were unable to determine precisely why the court chose the monetary amounts it did, or how the court reached the conclusion that these monetary amounts were the least restrictive amounts necessary to reasonably assure Pisano’s appearance and the safety of the public, particularly given the other components of Pisano’s supervision plan.²

On remand, the trial court held additional hearings. Following these hearings, the court reduced both components of Pisano’s monetary bail, but the court still retained bail at a level significantly greater than the \$75,000 Pisano had requested. The court set a total monetary bail of \$750,000 cash, comprised of a \$500,000 cash performance bond and a \$250,000 cash appearance bond.

In Pisano’s second bail appeal, we held that the trial court erred in speculating about the possibility that Pisano could raise bail money through financial contributions from crowd-funding sources.³ We also expressed continuing concerns about the high monetary bail — and in particular, the large, all-cash appearance bond.⁴

¹ See Court of Appeals File No. A-13089 (Order dated May 24, 2018).

² *Id.* at 6-7.

³ See Court of Appeals File No. A-13289 (Order dated Jan. 16, 2019), at 3-4.

⁴ *Id.* at 5-7.

The trial court again held additional hearings on remand. By that time, Pisano had received notice that he would not be permitted to reside at his family's home on Joint Base Elmendorf-Richardson (where he had lived with his wife and two children). Accordingly, Pisano proposed residing, on house arrest, at the home of an Anchorage couple — a residence inspected and approved by Alaska Pretrial Services. The husband is a pediatrician in Anchorage, and the couple has an adult son who is an officer with the Anchorage Police Department. (Pisano knows the family because his son plays soccer with the couple's grandson.)

The court also received additional testimony from an employee of Alaska Pretrial Services.

Following these hearings, the court declined to lower Pisano's monetary bail. As a result, bail remains set at \$750,000 — comprised of a \$500,000 cash performance bond and a \$250,000 cash appearance bond — in addition to all the previously-imposed conditions of bail.

Pisano again appeals the monetary bail imposed by the court. Pisano argues that the court failed to set bail in an amount that is the least restrictive necessary to reasonably assure his appearance and the safety of the community. Pisano also argues that the trial court relied on "unsupported, speculative, and even false propositions" when setting his bail.

Why we conclude that a remand is required and that the remand should include conversion of the \$250,000 all-cash appearance bond to a cash or corporate bond

In our order in Pisano’s second bail appeal, we expressed concern as to why a large, all-cash appearance bond was necessary, given the court’s finding that community safety was its primary concern and given the other protective bail conditions in place — namely, 24-hour electronic monitoring with house arrest and 24-hour third-party custodianship. Following the latest remand proceedings, the court continued to indicate that the risk to the community was its primary concern. Having reviewed the record, we conclude that the court has failed to provide a persuasive reason why the appearance bond cannot be converted to a cash or corporate bond.

The purpose of an appearance bond is to secure the defendant’s presence in court when required. The purpose of a performance bond is to secure the defendant’s compliance with other conditions of release. Appearance in court may not be a condition of a performance bond.⁵

Notwithstanding the separate purposes of the two bonds, the trial court’s justification for imposing a \$250,000 all-cash appearance bond continues to significantly overlap with its explanation for the even larger, all-cash performance bond. That is, the court’s primary concern continues to be the risk of bail violations or new criminal conduct if Pisano absconded from his third-party custodian or disabled his electronic monitor. But these are categories of conduct that the *performance* bond is designed to prevent.

⁵ Alaska R. Crim. P. 41(c)(1).

The court found that “[a] cash appearance bond is necessary because electronic monitoring and third-party custodians cannot guarantee the defendant’s appearance.” But the proper question is not whether the bail conditions will “guarantee” Pisano’s appearance in court; no condition can provide absolute assurance of a defendant’s compliance with the court’s release order. Rather, the correct question is what are the least restrictive conditions necessary to reasonably assure Pisano’s appearance in court.⁶

Moreover, the court’s only explanation for why a cash or corporate bond would not be sufficient is that it “would seriously reduce the amount of cash the defendant needs to post bail.” This is undoubtedly true, but it offers no explanation for why a cash or corporate bond is not sufficient. Posting bail through a bondsman would still require significant collateral while providing the additional monitoring of a surety.

Pisano has no prior criminal convictions and a wide network of support. While the court has in the past expressed concern that such an extensive network could assist Pisano in fleeing, Pisano has turned his passport over to Alaska Pretrial Services and will be required to sign a waiver of extradition as part of his agreement with the electronic monitoring company.

The court has also expressed concern in the past that Pisano does not own property in Alaska. At the same time, his wife and two children live here — and he has

⁶ Former AS 12.30.011(b) (2017); *see, e.g., Ludwig v. State*, 812 S.W.2d 323, 325 (Tex. Crim. App. 1991) (reducing bail in capital murder case involving two victims from \$1,000,000 to \$50,000 because bail was set in an amount “far more than is sufficient to give reasonable assurance [the defendant] will appear for trial”).

proposed a residence for house arrest acceptable to Alaska Pretrial Services. The court additionally noted in its current order that Pisano did not call 911 following the shooting. But after leaving the scene, Pisano called a police sergeant and reported the shooting.

We are sympathetic to the difficulties of setting bail in a case like this — and in particular, determining a defendant’s risk level and level of assets, and then correlating both to the appropriate bail conditions. But we agree with the New Jersey appellate court when it explained the importance of the constitutional right to pretrial bail:

[A]n excessive bail requirement should not be utilized as a means of confining the accused until trial. The amount of bail required in a given case, where serious offenses, such as murder, are involved, is not an easy decision. But in reaching it, the constitutional right to bail and the presumption of innocence cannot be overlooked.^[7]

Despite repeated hearings on remand, the court has not sufficiently explained why a \$250,000 all-cash appearance bond is the least restrictive monetary amount necessary in light of the other supervisory bail conditions in place. Accordingly,

⁷ *State v. Steele*, 61 A.3d 174, 181 (N.J. Super. App. Div. 2013) (quoting *State v. Johnson*, 294 A.2d 245, 253 (N.J. 1972)); *see also Eggleston v. State*, 917 S.W.2d 100, 102-03 (Tex. App. 1996) (acknowledging that the facts of this murder case warranted a substantial bail to ensure the defendant’s appearance at trial and the safety of the community, particularly given inconclusive nature of defendant’s financial assets, but reducing bail from \$1,000,000 to \$300,000 given countervailing constitutional rights).

we vacate the \$250,000 all-cash appearance bond and direct the court to, at a minimum, convert the bond to a cash or corporate bond.⁸

Pisano's evidentiary claims

Pisano also argues that the trial court's bail analysis rests on several unsupported factual findings.

First, Pisano points to the trial court's assertions that it is "common" for people to be arrested for crimes, including homicide, while on electronic monitoring, and that it is "common" for defendants to tamper with and remove the electronic monitor itself. The Alaska Pretrial Services representative testified that defendants sometimes violate their release conditions while on electronic monitoring. The representative also estimated that defendants monitored by Alaska Pretrial Services (which monitors about seventy defendants at a time) have removed or attempted to remove their monitors about a dozen times over the last decade. The State further notes that violations and crimes committed on release are a matter of public record, including several that have resulted in appellate decisions.⁹

⁸ AS 12.30.030(b) ("If the appellate court finds that the lower court abused its discretion, the appellate court may modify the order, remand the matter for further proceedings, or remand the matter directing entry of the appropriate order, including release under AS 12.30.011(a).").

⁹ See, e.g., *Smith v. State*, 187 P.3d 511, 523 (Alaska App. 2008); *Kone v. State*, 2018 WL 5733339, at *1 (Alaska App. Oct. 31, 2018) (unpublished); *Roberts v. State*, 2018 WL 1225086, at *1 (Alaska App. Mar. 7, 2018) (unpublished); *Grim v. State*, 2016 WL 482543, at *2 (Alaska App. Feb. 3, 2016) (unpublished).

But while there are certainly instances of bail violations and criminal conduct while on electronic monitoring, the record does not support the conclusion that this conduct is “common.”

The court’s view that this misconduct is “common” appears to have influenced its legal analysis. We note, for example, that the court explicitly linked its view about the commonality of defendants committing new crimes while on electronic monitoring to its finding that “[a] cash appearance bond is necessary because electronic monitoring and third-party custodians cannot guarantee the defendant’s appearance.” But as we noted earlier, the proper question is not whether the bail conditions will “guarantee” Pisano’s appearance in court; rather, the question is what are the least restrictive conditions necessary to reasonably assure Pisano’s appearance in court. We direct the trial court on remand to reexamine the monetary bail amount using the proper standard.

Pisano also points to the trial court’s statement that the three shooting victims were “shot in the back of the head.” Pisano asserts that this statement is not supported by the photographs, which show only one victim who was shot in the back of the head. Pisano also asserts, without any further explanation, that the photographs submitted to the court show that Dupree, rather than Pisano, shot Cook. We find no merit to this latter argument. The photographs themselves do not show the identity of the person who fired the gun.

But we acknowledge — and the State implicitly concedes — that the court erred when it stated that all of the victims were shot in the back of the head (rather than the side of the head or the face). The court appears to have relied on this fact in assessing

Pisano's dangerousness, although it is unclear how significant the error is to the court's underlying bail analysis. Because we are remanding for other reasons, Pisano may address this issue on remand.

Lastly, Pisano objects to the court's reliance on a letter submitted to the court by Michael Dupree, the alleged assault victim. But Pisano did not object to the court's consideration of this letter, and indeed, referenced the letter during his bail remarks. Accordingly, this claim is not preserved for review.

Pisano's arguments regarding his financial assets

Finally, Pisano argues that the trial court did not adequately consider his financial information in assessing the amount of monetary bail.¹⁰ But the record supports the trial court's continued concern about its inability to meaningfully assess Pisano's resources.

During the proceedings on remand, Pisano provided updated financial information to the court. The information indicates that Pisano is in debt and has a limited income (a military pension), and that his parents' finances remain largely unchanged since they initially provided financial information in early 2018. Both the prosecutor and the judge acknowledged that Pisano's current personal financial situation

¹⁰ See former AS 12.30.011(c) (2017) (setting out the factors a court must consider in determining conditions of release, including "the assets available to the person to meet monetary conditions of release"). Pisano's case is governed by the bail statute in place in 2017. See *Pisano v. State*, Court of Appeals File No. A-13089 (Order dated May 24, 2018, at 10).

is similar to the situation that existed in the early stages of this case, when Pisano was represented by public counsel.

But the judge expressed significant concerns about the fact that Pisano has declined to disclose how he obtained the funds to hire private counsel, and as a result, the court lacks “a complete picture of his financial resources.” Given this, the court expressed difficulty assessing the resources available to Pisano to meet monetary bail — and thus what amount of bail is necessary to incentivize Pisano to comply with his release conditions.

Pisano argues that the trial court is not entitled to any information about the source of his counsel fees. But the trial court did not suggest that it could *require* Pisano or his attorney to disclose the source of the attorney’s fees. Instead, the court only noted that, absent that information, the court could reasonably question whether it had a complete picture of Pisano’s available resources. We find nothing improper in that statement.

Here, in assessing the appropriate bail conditions, the court was obliged to evaluate all the factors set out in AS 12.30.011(c). The “assets available to the defendant,” while important, is only one of those factors. The court reasonably concluded that the absence of a complete record on this point made reliance on this factor more difficult.

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Conclusion

We **VACATE** the \$250,000 all-cash appearance bond, and we **REMAND** this case for further proceedings consistent with this order. On remand, the superior court shall reconsider the total amount of monetary bail in this case and shall also convert the all-cash appearance bond to a cash-corporate bond.

Entered at the direction of the Court.

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